



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JAN 16 2009

OFFICE OF
WATER

The Honorable Thomas R. Carper
United States Senate
Washington, D.C. 20510

Dear Senator Carper:

Thank you for your letter of November 21, 2008 to the U.S. Environmental Protection Agency (EPA) concerning the status of EPA's authorization of Delaware's Concentrated Animal Feeding Operation (CAFO) program and request for a path forward to resolve the matter. Administrator Johnson has requested that I respond to you due to my conversation with you on December 5, 2008.

EPA acknowledges that Delaware has adopted a nutrient management law applicable to CAFOs in Delaware. This law and related regulations represent an affirmative step toward meeting the objectives of the Clean Water Act (CWA), including protection of water quality in Delaware and the Chesapeake Bay watershed. EPA acknowledges that Delaware's nutrient management program reaches a larger universe of animal feeding operations than is required to comply with the CWA National Pollutant Discharge Elimination System (NPDES) CAFO program. Under provisions of the CWA, the Delaware Department of Natural Resources and Environmental Control (DNREC) is authorized to administer the federal NPDES program and, as a condition of that authorization, has agreed to implement the program, including laws, regulations and implementation procedures that are at least as stringent as the federal program.

There are a number of programmatic issues that prevent EPA's approval of the CAFO provisions of Delaware's NPDES program. You have noted correctly that the most significant problem has been what triggers the requirement for a CAFO to seek and obtain coverage under an NPDES permit. Delaware maintains that an NPDES permit is only required when a CAFO meets the numerical animal limit, has a discharge into waters of the state, and is in non-compliance with Delaware Nutrient Management Regulations. This is not consistent with the requirements of the CWA and supporting regulations.

The federal CAFO regulations do not include a provision for evaluating "functional equivalency" of a state program. The minimum requirements of the federal regulations serve as a national floor to ensure a level playing field for owners and operators of such facilities. The CWA requires that point source dischargers must have a valid NPDES permit prior to discharging pollutants into the waters of the United States. For CAFO operations, the NPDES permit identifies controls on the discharge and provides other record keeping and reporting

requirements. If a CAFO that discharges or proposes to discharge does not have a valid NPDES CAFO permit, as required under the CWA and 40 CFR 122.23(d) and (f), it is exposing itself to risk of citizen suit and/or federal/state enforcement. While compliance with the Delaware nutrient management program provides many important environmental benefits, it does not constitute automatic compliance with the requirements of the CWA.

As authorized by the CWA, the NPDES permit program controls water pollution by regulating point sources that discharge pollutants into waters of the United States. The CWA prohibits the discharge of "pollutants" through a "point source" into a "water of the United States" except where authorized by an NPDES permit. CAFOs are defined as a point source under Section 502 of the CWA and are further defined in 40 CFR 122.23. The term pollutant is defined very broadly in the CWA and associated regulations. See 40 CFR 122.2. For example, in the case of CAFOs, pollutants include raw materials, products, or byproducts, including manure, litter, and feed. Potential sources of such pollutants at a CAFO could include manure handling and storage activities, feed storage, litter storage, and litter released through confinement house ventilation fans. For CAFOs, any point source discharge of stormwater that comes into contact with these materials and reaches waters of the United States is a violation of the CWA unless authorized by a Clean Water Act NPDES permit.

EPA proposes a two-step process to move forward. The first phase focuses on getting operations that meet the federal Clean Water Act CAFO definition and "discharge or propose to discharge" to seek coverage under an NPDES permit. Under the federal CAFO regulations, as amended in October 2008, dry poultry CAFOs that discharge or propose to discharge pollutants into waters of the United States must seek permit coverage by February 27, 2009, or be subject to federal/state/citizen enforcement for failure to do so. It is important that the State of Delaware inform poultry operations in Delaware of this important date and the actions producers must take in order to be in compliance with the CWA. EPA also suggests that DNREC implement an outreach initiative to poultry operations in Delaware with dry manure handling systems that discharge or propose to discharge, informing them of the need to seek coverage under an NPDES permit by February 27, 2009. EPA can provide materials to facilitate this outreach if necessary. EPA will work expeditiously with the State to achieve these objectives.

The second phase would be for EPA to work with Delaware to provide assistance in making the necessary changes to their CAFO regulations that EPA could approve. Issues that must be resolved include:

- Duty to Apply (40 CFR 122.23);
- State Program Authorization (40 CFR part 123);
- Temporary Stockpiling of Litter and Wet Manure Operations (40 CFR 122.23);
- Conformance with Effluent Limitations Guidelines for CAFOs (40 CFR part 412);
- Public Access and Notification of Nutrient Management Plans (40 CFR 122.23(h) and 40 CFR part 124);
- Entry and Inspection Conditions (40 CFR 123.26); and
- Enforcement Penalties (40 CFR 123.27).

EPA will propose to DNREC and the Delaware Department of Agriculture a meeting within one month to map out a schedule to deal with phase two of this process. We believe that the negotiations on the necessary regulatory changes could be concluded within six months, with approvable regulations in place within one year.

We appreciate the interest expressed by the Delaware Congressional Delegation on this critical environmental matter and share the urgency to get this resolved as soon as possible. If you have any questions or concerns, please do not hesitate to contact me or have your staff contact Mr. Shawn Garvin, EPA's Delaware Liaison, at 215-814-2998.

*Thank
you*

Sincerely,

A handwritten signature in black ink, appearing to read "B. H. Grumbles", written in a cursive style.

Benjamin H. Grumbles
Assistant Administrator

cc: Donald S. Welsh
Regional Administrator



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JAN 16 2009

OFFICE OF
WATER

The Honorable Michael N. Castle
U.S. House of Representatives
Washington, D.C. 20515

Dear Congressman Castle:

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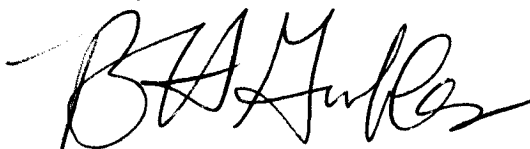
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Benjamin H. Grumbles
Assistant Administrator

cc: Donald S. Welsh
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